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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 843

SAFEWAY TRAILS, INC.,

Petitioner,

vs.

AARON E. GREENLEAF.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS B. ARNOLD,
Counsel for Petitioner.

OLCOTT, HAVENS, WANDLESS & STITT,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Safeway Trails, Inc., prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case on March 21, 1944 (R. 244).

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet officially reported, but appears at page 234 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered March 21, 1944 (R. 244). The

jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Was the failure to join as defendant below Eastern Trails, which was jointly liable with petitioner, a defense to the present action? Eastern Trials, Inc., was subject to the jurisdiction of the District Court as to both service of process and venue and capable of being made a party without depriving the District Court of jurisdiction of the present parties.

Was petitioner, as defendant below, entitled to a dismissal of the complaint on the merits on the ground that the making of an audit by a certified public accountant was a condition precedent to defendant's liability under the terms of the contract alleged in the complaint?

Was petitioner, as defendant below, entitled to a dismissal of the complaint on the merits on the grounds that the contract alleged was not made by anyone authorized to act on defendant's behalf and that the unauthorized acts of those who assumed to act on its behalf were not ratified?

Statutes and Rules of Court Involved.

Act of June 19, 1934, Ch. 651 (48 Stat. 1064), U. S. C., Title 28, Secs. 723 b, 723 c.

Rules 19(a) and 19(b) of Federal Rules of Civil Procedure.

RULE 19.

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses

to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance, or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Statement of Case.

On October 22, 1940, Aaron E. Greenleaf, plaintiff below, and certain other persons (R. 24), entered into an agreement in writing which included the following provisions:

"(6) The parties agree that there shall be made within a reasonable time an audit by a certified public accountant of the books and accounts of Safeway Trails, Inc., and Eastern Trails, Inc., and that any amounts found to be due and owing to the party of the first part (Aaron E. Greenleaf) by Eastern Trails, Inc., shall thereupon be represented by a negotiable promissory note, payable with interest at Five (5%) Per cent per annum on unpaid balances to the party of the first part in amounts of Five Hundred ($500.00) Dollars per month, including interest, until paid in full."

Subsequently, with the approval of the president of defendant and three other persons who shortly thereafter became

directors of defendant, counsel for defendant and for Eastern Trails signed and delivered to counsel for plaintiff a letter containing the following language (R. 32):

> "In Clause (6) of the agreement of October 22, 1940, there is provision for the payment to Mr. Aaron E. Greenleaf of the sums due him by Eastern Trails, Inc. and Safeway Trails, Inc. as they may appear from a proper audit therein provided for. Mr. Schnebly has agreed that the audit of these accounts will be commenced immediately as soon as he can secure an accountant at a reasonable price. In the meantime, as counsel for each company and as a party under the agreement, I agree with you that the corporations will cause to be executed a note providing for payment of the total sum when found by the audit at the rate of Five Hundred ($500.00) Dollars per month, including interest at the rate of Five (5%) Per Cent, per annum, said interest to be computed from the date of the note, but the amount of the note to embrace prior interest due. The note will be so drafted as to provide that upon failure to pay any monthly sum on the day when due, Mr. Greenleaf may give notice in writing to the corporations liable on the note and if the overdue payment is not made within thirty (30) days from the date of the notice, the entire balance of the note including interest to date of payment will be accelerated and become due and payable."

Since October 22, 1940, there has been no audit by a certified public accountant or by anyone else of the account of the plaintiff with Eastern Trails and the books of Eastern Trails have not been in such condition as to enable anyone to make an audit of such account (R. 218).

No note has been made by either Eastern Trails or Safeway Trails, but Eastern Trails has made certain payments to plaintiff on account of its indebtedness to him (R. 217).

On October 22, 1940, Eastern Trails was and it ever since has been and still is a New Jersey corporation doing busi-

ness in the Southern District of New York, subject to the jurisdiction of the District Court for the Southern District of New York as to both service of process and venue. Throughout the pendency of the action in the District Court, Eastern Trails could have been made a party thereto without depriving the Court of jurisdiction of the present parties and was not made a party thereto (R. 218-219).

There has been no action at any time by the board of directors or at a meeting of stockholders of Safeway Trails with respect to the making of the agreement which counsel for defendant and Eastern Trails purported to make in the above-mentioned letter.

The District Court held:

(1) Eastern Trails had and has a joint interest with the defendant in an action on the indebtedness of Eastern Trails to the plaintiff or on any promissory note to the plaintiff by the defendant and Eastern Trails for the amount of such indebtedness (R. 219).

(2) The failure of the plaintiff to make Eastern Trails a party to the action ousts this Court of jurisdiction of the present action (R. 219).

(3) The contract alleged in the complaint was in fact made by defendant (R. 216).

(4) An audit by a certified public accountant of the account of the plaintiff with Eastern Trails was a condition precedent to the maintenance of an action by the plaintiff on account of the indebtedness of Eastern Trails to the plaintiff or upon any promissory note by the defendant and Eastern Trails for the amount thereof (R. 219).

The Circuit Court of Appeals reversed, holding that even though the obligation is joint (R. 235), it was unnecessary to join Eastern Trails as a defendant because a judgment could be rendered against Safeway Trails alone without in-

justice to it; that the making of the audit was not a condition precedent to liability, and that if it were, the condition had been waived. In a concurring opinion by Judge Clark, it was held that Eastern Trails was merely a "proper party", and was the unimportant and dominated part of the combine, rather than a co-equal promisor (R. 239).

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that Eastern Trails was not a necessary party to the action pursuant to the provisions of Rule 19(a) and (b) of the Rules of Civil Procedure.

(2) In holding that the agreement made by counsel and the other persons was binding on defendant without action by its board of directors or at a meeting of its stockholders.

(3) In holding that the making of an audit was not a condition precedent to liability under the agreement alleged, and that such condition precedent had been waived.

(4) In reversing the judgment of the District Court.